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ture are so thoroughly mechanical, that we by no means make what we should of our discoveries.

The truth is, not excepting the law of real property and the law of procedure, criminal law is the most archaic part of our legal system. But it has to deal with some of the most modern of problems. It needs and will soon receive a very different form of study and a radically different type of treatment from those which have obtained in the past. Whatever we may think of the author's somewhat confident prophecy as to the results which the new science is to achieve for us (p. 91), we may welcome this concise and convenient summary of what continental scientists and philosophers have been doing and thinking.

A few clerical inaccuracies, such as the reference to "Alexander De Tocqueville" (p. 5) and the French form of reference to the *Ascaris* noted by Lombroso in one of his cases (p. 88), are perhaps inevitable in a first edition.

ROSCOE POUND.

*Themis, Dike und Verwandtes. Ein Beitrag zur Geschichte der Rechts-idee bei den Griechen.* By RUDOLPH HIRZEL. (Leipzig: S. Hirzel. 1907. Pp. 445.)

The wider and more critical survey of the fields of law, religion, and political and sociological history, which comparative study of late has made possible, has made even more clear the long recognized fact that the boundaries between law, custom, and religion, in early times, are hard to mark off with certainty. It is well known that the Romans personified as goddesses, the abstractions *Æquitas* and *Iustitia*, and that the Greeks, with their more vivid imaginations, had in *Themis* and *Dike*, two goddesses, very real incarnations of divine and human custom and law. But it is a pleasure to have our general or vague ideas corrected, illumined, or fixed; and it is fortunate that the study of the Greek Law and Justice has been made by such a scholar as Professor Hirzel.

Professor Hirzel begins with the older of the two goddesses, *Themis*, who was originally nothing more than a personification of good counsel. He finds her mentioned in Homer among the Olympian gods. In the war with the Titans she gives Zeus advice which brings victory. There is indeed no case found where Zeus does not take the advice of *Themis*. The fact that the great Father of the gods is seen to be dependent upon her as his adviser, as the Roman magistrate upon his consilium, and the Attic archons upon their councillors (*Πάρεδροι*), brings about the use of

Zeus and Themis as identical terms. But the province of Themis as the giver of advice is not restricted to the gods alone; she also gives good advice to men. At Delphi she imparts oracles to those who seek her counsel, and her altars stand in the market places in the different cities. Now, the oracles, advices, or answers (which, in a way, correspond very nearly to the responsa of the Roman jurists) of Themis, who, although conceived of as identical with Zeus, was nevertheless used as an approachable intermediary, were called themistes, and considered Zeus-given advices. Two of the famous kings of ancient times, who held their power as delegates of Zeus, were Minos and Agamemnon. Minos, according to the Greeks, made his reputation rather by giving keen counsel than by giving laws; Agamemnon ruled with sceptre and themistes. The giving of advice by Zeus-Themis passes easily into the right to give such advice. When, later, the right to give advice and to pronounce law are found to belong to the same person, an explanation seems to be forthcoming, and it rests on the old judgment that where Themis is, Justice must also be. The fact that the Latin words *consilium* and *præceptum*, like the German word *Rat*, have this double meaning, and that a consul, according to Quintilian, was a magistrate who either gave advice or pronounced judgment (*sit enim consul a consulendo vel a iudicando*, I. O., I, 6, 32) help to make this conception very probable. Greek philosophical skepticism took a great many prerogatives away from the gods. In the later writers Themis and the themistes are dethroned. They no longer retain the meaning of god-given advice, which was held to be unwritten law, but they come to denote all laws, even written ones. It was at this time that Themis became the goddess of law and its study. Themis, however, despite this slight generalizing tendency, never lost its force as a god-given precept. Homer (*Odys.* 14, 56ff.) calls it Themis, i.e., a holy law, to honor the stranger. The conclusion of the matter is, that Themis is the same as the Roman *fas*, and means the sentence of a god.

Together with Themis, the doer of good to gods and men, in Homer and Hesiod, is found Dike, the daughter of Themis. Sometimes she appears as the sentence of the judge, as Right or Justice, and often as Manner or Custom. Hirzel challenges von Ihering and Jebb, who say that all law, and therefore the law of the Greeks, gets its origin from custom, and that Dike mirrors all the changing meanings of this development, and asks: Is Law the root from which Dike grew? No! She has too much strength and vitality to have come from an abstraction, neither can she have come from legal decisions or Justice, which first need a sanction or a

precedent. The sentence of a judge was founded, not on codified or customary law, but was itself creative. Here it was that law first represented itself with a power which at once took hold of the imagination, and here it first developed its name, Dike. Herder says that most contending parties chose as judge the cheapest and shrewdest man, but the Romans chose a wise and experienced one. Hirzel, however, shows that the Greek judge had more good qualities than either. He had knowledge of law, wisdom, and common sense, as a matter of course, but he had also an innate something which partook of the divine. Intolerant democrats as the Athenian judges were, they could not take the wand, the old regal symbol, without showing the sense of importance which attached to the godgiven right of thereby giving an infallible decision. Aristophanes caricatures this feeling of importance with which a poor three obol democrat assume airs "as if he were a sovereign, which is the soul of the commonwealth" (Hobbes, *Leviathan* 111, 42), but the fact is made plain. This wand of the judges is the direct descendant of the ancient one, by the strokes of which the judge rendered his decision. In Homer and Hesiod, the straight stroke meant the right, the oblique stroke, the wrong. When administration of justice was personified, Dike was given the judge's wand as her emblem.

The idea of justice among the Greeks, according to Hirzel, takes a development which can be shown positively by following the meanings of the word Dike. Schopenhauer makes injustice the positive and original, justice the derived and negative idea; Hobbes says: "Whatsoever is not unjust, is just," but Hirzel makes Dike express it all. Dike is, first, the judicial decision asked for by contending parties. This decision, later, carried with it punishment and revenge, and out of the simple concentrated power of the judge's decision grew the whole proceedings at law. Retaliation, as shown by the use of the word Dike, came later in the Greek mind. The judge in the oldest time was restricted to the decision as to which party spoke the truth. Dike, then, was just, because it was true (there was no distinction, such as the Romans made later, between *iuridici* and *veridici*). That is, Truth and Justice belong originally together, in fact Dike (*Δίκη*) and Aletheia (*Ἀλήθεια*) appear as daughters of Zeus. Second, Dike gets herself identified with custom and retaliation. With the growth of self interest, which runs away from Truth, Dike and Themis part company, for Themis and Truth are not found together, but Dike and Truth stick close together. Now, Custom has nothing in common with experience and truth, but rests on example. It is only the union of Dike with Truth which saves her from entire

identification with custom, both good and bad. Again, when retaliation impressed itself so strongly in the word Dike that it was often taken as her original signification, it was again only the close alliance with Truth which saved her. Third, Dike is the strongest influence in Greek life, and yet does not use force (*βία*) in the exercise of it. Dike has been called a theoretical fancy bound to Truth, and made to look a sorry figure beside the powerful Ius of the Romans. But it is just here that Hirzel makes clash the different legal ideas of the Greeks and Romans. The Roman Ius conferred power over persons and things, the Greek Dike vouchsafes only a claim on services, and appeals to the feeling of duty; he who has the Ius, takes what belongs to him, but Dike is simply given to him who is favored thereby: the Ius of the Romans depends on vis, might, the Dike of the Greeks is no whit the weaker, yet does not rely on *βία*, force. The decision of the magistrates in Greece were never called dikae, because they had not the authority of the judge, but such decisions at Rome could well be iura, because their source was the highest original power, the power of the people. Fourth, Dike appears as goddess of arbitration, and goes hand in hand with Truth. Fifth, Dike gets the connotation of Revenge. As the helper of Zeus, early poetry adorns Dike with every virtue. With Hesiod, however, she begins to be thought of as an Erinyes, who looks for revenge. The features of the goddess change with the meaning of the word Δίκη. From being the goddess of justice she becomes the goddess of revengeful punishment, and the Stoic Chrysippus is even ready to call her the goddess of cruelty. Sixth, Dike leaves her mother Themis to become incarnate, is humanized, extends her influence even to the beasts, and to the lower world. Still, although Dike goes her own way, her domain often touches that of her mother Themis. Dike rules the life of men, Themis takes cognizance of men's affairs; Themis and Dike were originally not a complex of laws, but one act. Themis, however, becomes the advice, the command, of the head of the house, of the king, or of God; Dike is the deciding sentence of the judge, and both are one in their stand against every kind of presumption. Dike, however, is never a beneficial and solicitous goddess, as is Themis, but remains she who has Truth in mind, and does not advise in friendly fashion, but commands with threats. Themis and Dike are comparable to the ius fasque of the Romans, for in ancient times with both Greeks and Romans all law had the divine sanction. In both cases, the divine and human law separate, and later come again to a common humanization. Seventh, Dike becomes a Virtue. The three virtues that run through history are Piety, Bravery and Justice,

and it is the new virtue, Justice, to which Dike attaches herself, and with which she becomes identified (*Δικαιοσύνη*). Cicero grounded ancient law, *iura*, on *utilitas communis*, Pufendorf with his theory of contract makes it *consensus tacitus*. But Justice with the Greeks was more than a fulfillment of private agreement, or a taking of requital. As far back as Solon came in the *iustitia distributiva* founded on Dike. Finally, except in the world of make-believe, that of the poets, Dike absorbed all the attributes and privileges of Themis, and expressed to the Greeks the entirety of the law. Dike, then, the original judicial decision, conquers Themis, the decision of gods and rulers. Over the world of mankind, whether under her own name, or in the name of equality which she assumes, she lords it more widely in each succeeding age.

Thus far Themis and Dike have been the two sources of natural law and its philosophy, but now there comes to the front another manifestation of right or natural law in the form of Thesmos, fixed law (*θεσμός*). Thesmos, the result of an activity, never became a real god in personality, as did Themis and Dike. In the early sense, Thesmos is to be taken as the pervading principle of single *Nomoi*. Later in Athens, the Thesmos, as administered by the Thesmothetæ, is the regulation of legal procedure as a whole, according to the law. It can be likened to the *edictum perpetuum* of the Roman prætor. Just as Dike took the functions of Themis, and broadened out over the whole field of Greek law, so Thesmos began to gain in influence. It was the ideal of a law-giver to compel the people to obey his laws not only through force, but also by persuasion. Thesmos, as a regulation, differed from Themis, as Counsel, and from *Dikê*, as Judgment, but did take on later some of the religious signification of Themis. He who did not follow Themis, was sufficiently punished by the outcome for not taking her advice. In the word Dike, was inherently the punishment, but Thesmos as law had to have the penalty attached in order to get itself carried through. Custom had a beginning, and on it rests Thesmos. The ancients sought for the beginnings of customs, and inclined to fix them on some one person. Strictly the difference is that the binding force of growing custom comes after years of precedent, while the binding force of Thesmos begins from the first moment, whether it comes from the personal authority of some founder, or because of a sworn agreement.

Finally, added to the many crossed principles of lawmaking, to Themis as the counsel of the higher sort, to Dike as the judicial decision, and to Thesmos as the simple expression of a sovereign will, came a new idea which sprang from manners and customs, the *Nomos* (*νόμος*). Hir-

zel takes up the history of the word *Nomos* in the epic poets, and by its usage as far as Clisthenes, shows that the word meant customs or habits, which, as in Hesiod for example, both animals and men had alike. He brings in from the writers of the fifth and fourth centuries many examples to prove the old meaning of the word as still used for customs or manners. Slowly, however, the idea came that in *Nomos*, also, a command was implicit, and as it became stronger it brought out *Nomos* sharply and clearly as a new idea. The word came to mean orders of tyrants, and the rules of the sciences and the arts. Later, *Nomos* appears as the source of *Dike*, not merely an expression of it. The youngest legal principle becomes the most powerful. The new real son of Zeus is *Nomos*, and he gets all the hymns of praise formerly offered to *Dike*.

Speaking generally it may be said that Professor Hirzel has brought together all the literary occurrences of the words with which he deals. He has mastered the intricacies of his subject and adheres to the natural divisions. The only criticisms that the work would seem to justify are that the notes are too heavy and overbalance the text, and that the author displays an excessive desire to ascribe to the Greeks the creation of all possible forms of law. If sovereignty be needed as the basis of law, *Themis* is present to fill any gap in the argument; if customary law be held to furnish the basis of legal development, *Nomos* is at hand; if the historical method requires illustration, *Dike* is presented with a history continuous enough to satisfy all demands, and if the comparative method be demanded the author has sufficient facts in hand and does not stint their use.

R. V. D. MAGOFFIN.

LE DROIT INTERNATIONAL: LES PRINCIPES, LES THEORIES, LES FAITS.

PAR ERNEST NYS, Conseiller à la Cour d'Appel, Professeur à l'Université de Bruxelles, Membre de la Cour permanente d'arbitrage. (Bruxelles: Alfred Castaigne. Paris: Albert Fontemoing. Tome iii, pp. 758. 1906.)

The first two volumes of this work were noticed in an earlier number of this REVIEW (vol. i, pp. 145-148). The elaborate treatment which they contained of certain topics gave promise of a more comprehensive treatise than the completed work now presents. More than half of the present volume (463 pages) is devoted to the subject of war, while the law of neutrality is covered in 138 pages, and the important subject of arbitra-